

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of the)
Telecommunications Act of 1996)
)
Amendment of Rules Governing Procedures)
to Be Followed When Formal Complaints)
Are Filed Against Common Carriers)

CC Docket No. 96-238

JOINT REPLY COMMENTS OF BELL ATLANTIC¹ AND NYNEX²

I. Introduction and Summary

All of the parties agree with the Notice³ that the existing formal complaint rules must be revised and streamlined in order for the Commission to meet the stringent decision deadlines imposed in the Telecommunications Act of 1996 ("Act").⁴ The three to five month period for resolution leaves scant time for procedural wrangling or disputes over the scope of

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

² The NYNEX telephone companies ("NYNEX") are New York Telephone Company and New England Telephone Company.

³ *Notice of Proposed Rulemaking*, FCC 96-460 (rel. Nov. 27, 1996) ("Notice").

⁴ *See* 47 U.S.C §§ 208(b)(1) (five months), 260(b) (120 days), 271(d)(6)(B) (90 days), and 275(c) (120 days).

discovery. For that reason, most parties concur that substantial pre-filing activity is required to help encourage settlement, narrow the issues, and reduce discovery disputes. Only AT&T opposes mandatory pre-filing activity, claiming that such a mandate would act as an unlawful bar against the right to file complaints. As shown below, AT&T's argument is without legal foundation.

In addition, the comments demonstrate the need for vigilance to prevent abuse of the process by filing frivolous complaints. Indeed, some of the very comments in this proceeding suggest that certain parties intend to "game" the Commission's procedures by filing potentially frivolous complaints in an effort to gain access to sensitive competitive information. Unless the Commission takes forthright action, both in its order in this docket and by dealing decisively with frivolous complaints, the process will collapse and any chance of streamlining the complaint process will be lost.

II. Only By Requiring Meaningful Pre-Filing Activity Can the Commission Meet Tight Statutory Deadlines.

There is widespread support for the Commission's proposal to require a complainant to demonstrate that substantive contacts between the parties took place prior to filing.⁵ Several of these parties joined Bell Atlantic and NYNEX in urging adoption of more robust pre-filing procedures than those proposed in the Notice. For example, one commenter asks the Commission to require both parties to certify that they have undertaken reasonable,

⁵ See, e.g., America's Carrier Telecommunication Association ("ACTA") at 2-3, Cincinnati Bell Telephone at 5-6, MFS Communications Company, Inc. at 2-4.

good-faith efforts to address and resolve the issues in dispute.⁶ Another proposes that complainants serve copies of their complaints on defendants prior to filing with the Commission and contact defendants to discuss settlement.⁷ The proposals of NYNEX and Bell Atlantic would similarly encourage settlement or narrowing of issues. NYNEX suggests requiring pre-filing use of Commission-certified mediators,⁸ while Bell Atlantic proposes that the complainant inform the defendant in writing of the nature and basis of the complaint and afford a reasonable time for a substantive response before the complaint is filed.⁹

Any of these suggested pre-filing requirements will help achieve the Commission's goals. In addition, contrary to the claims of AT&T, any of them would be lawful. AT&T contends that any pre-filing requirements would be an "improper restriction on a party's unconditional statutory right to file a complaint."¹⁰ None, however, would prevent a party from filing a complaint. It would only require a limited amount of contact between the parties to attempt to resolve the issues. If the contacts prove fruitless, or if the defendant fails or refuses to respond, the complaint may be filed promptly, without any approval from the Commission.

The one case AT&T cites stands only for the proposition that a requirement to obtain special permission, *i.e.* prior Commission approval, before it may file a tariff under

⁶ Telecommunications Resellers Association ("TRA") at 10.

⁷ Communications and Energy Dispute Resolution Associates at 4.

⁸ NYNEX at 3.

⁹ Bell Atlantic at 3.

¹⁰ AT&T at 6.

Section 203¹¹ unlawfully interferes with the carrier's right to file a tariff.¹² Even if that holding can be extended to Section 208 complaints, it is not in point here. Under none of the proposals would prior Commission approval be needed before filing a complaint. Therefore, no party's right to file a complaint would be impaired.

III. The Commission Must Not Tolerate Frivolous Complaints.

Most parties express their desire to cooperate with the Commission and to help ensure that complaints can be resolved quickly. Others, however, suggest in their comments that they may intend to "game" the system by filing potentially frivolous complaints or by entering the complaint process with no intention of trying to settle their disputes. MCI, for example, proposes that one party's failure or refusal to respond to a pre-filing request should justify the opposing party in refusing to meet "a corresponding pleading requirement."¹³ Apparently MCI is suggesting that the complainant, which has the burden of proof, should be relieved of the obligation to provide the Commission with information needed to prove its claim. Not only would adoption of such a provision prevent the Commission from obtaining information needed to reach a decision and make it nearly impossible of the Commission to meet its statutory deadlines, the example provided suggests that MCI itself plans to abuse the process.

¹¹ 47 U.S.C. § 203.

¹² *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

¹³ MCI at 7.

MCI posits a situation where an incumbent local exchange carrier increases the rate for an access rate element, but where the increase “does not violate the price cap rules.”¹⁴ MCI suggests that the complainant should have the right, before filing, to obtain “sufficient cost support data from the carrier to demonstrate that the rate was reasonably cost-based.”¹⁵ If the carrier refuses to provide those data, MCI wants the right to refuse to provide any documentation to support its complaint.¹⁶

Under MCI’s example, however, the tariff increase, which MCI concedes is consistent with the price cap rules, would be lawful on its face and the complaint baseless. Under the price cap rules, the filing carrier does not need to cost-justify an in-band rate increase. The cost data that MCI would have the filing carrier provide is not relevant to the lawfulness of the rate, and MCI would have no right to discover that material in a complaint proceeding. By using this example in its comments, MCI seems to suggest that it plans to abuse the revised complaint process and attempt to obtain competitively-sensitive information from other carriers through the filing of frivolous complaints.

MCI then seeks to deprive the Commission of the ability to dismiss summarily such facially defective complaints. Instead, MCI wants to place the burden on the defendant to “file dispositive motions bringing such defects to the Commission’s attention.”¹⁷ It is unfortunate that the staff will need to review defective complaints of the type MCI cites, but the

¹⁴ *Id.* at 8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 12.

Commission should not compound the burden by requiring the defendant to file an answer, waste everyone's time in a status conference, and force the parties to argue discovery motions before dismissing a facially meritless complaint. Instead such complaints should be dismissed at the initial stage.

ICG asks for a pre-filing requirement that the complainant "has made a clear *demand* for relief ... and defendant has explicitly denied or effectively rejected the request."¹⁸ ICG does not propose that there be any settlement discussions, just a presumably non-negotiable "demand" (not request) for relief and denial by the defendant. Such a proposal will hardly provide a basis for cooperation or settlement. Instead, it is likely to harden the parties' positions to the degree that further discussion will prove fruitless. Instead, as Bell Atlantic, NYNEX and others proposed, the pre-filing requirement should be aimed at settling or narrowing the issues, not discouraging negotiation.

Finally, ACTA and TRA ask the Commission to deprive the staff of the right to direct the conduct of a complaint proceeding. Instead, ACTA would leave the need for discovery to the discretion of the complainant, subject to the defendant's objections,¹⁹ and TRA would not allow bifurcation of liability and damage issues without the acquiescence of the complainant.²⁰ Under the existing rules, the Commission staff has the full right to rule on discovery disputes and on bifurcation, with or without acquiescence by the complainant. Given the short deadlines, there is even more of a need to retain that discretion. Furthermore, there is no justification for

¹⁸ ICG Telecom Group ("ICG") at 8 (emphasis added).

¹⁹ ACTA at 6.

²⁰ TRA at 22.

raising the interests of the complainant over those of the defendant by giving the complainant authority to dictate the conduct of the proceeding.

IV. Pre-Filing Activity May Eliminate the Need for Information and Belief Pleadings.

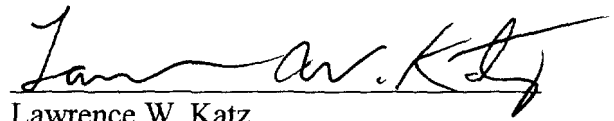
A number of parties suggest that, in some circumstances, information critical to a complaint will be exclusively in the defendant's hands. In those circumstances, they assert, the Commission should permit complaints to be based on information and belief, rather than on documented facts.²¹ The expanded pre-filing activities proposed by Bell Atlantic, NYNEX and a number of other parties will, in many cases, provide the complainant with information needed to document its claims, mooted the need for information and belief filings. While such filings should not be precluded, they should be limited to those instances where the needed facts have not been obtained in the pre-filing process.

²¹ *See, e.g.* ACTA at 4, American Public Communications Council at 4-5, MCI at 7-15, Teleport Communications Group, Inc. at 2-3.

V. Conclusion

The Commission should adopt the pre-filing requirements proposed in many of the comments and deny the proposals of a few parties to subvert the Commission's complaint processes.

Respectfully Submitted,

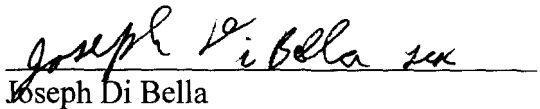


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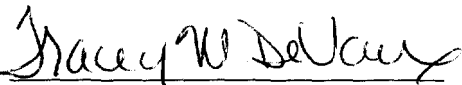
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January 31, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 1997 a copy of the foregoing "Joint Reply Comments of Bell Atlantic and NYNEX" was served on the parties on the attached list by messenger.


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